

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DYE SEED, INC., ) NO. CV-12-0218-LRS  
Plaintiff, ) ORDER GRANTING PLAINTIFF'S  
-vs- ) MOTION FOR PARTIAL SUMMARY  
FARMLAND MUTUAL INSURANCE ) JUDGMENT  
COMPANY, )  
Defendant. )

**BEFORE THE COURT** are each party's Motion For Partial Summary Judgment (ECF Nos. 14, 20) filed on March 14, 2013 and April 5, 2013 respectively. A telephonic oral argument was held May 23, 2013. Brian Sheldon participated on behalf of the Plaintiff; Toni Anders participated on behalf of Defendant. At the conclusion of the hearing, the Court took the motions under advisement. The Court having considered the oral and written argument of counsel, now enters this Order.

## I. BRIEF BACKGROUND

Plaintiff Dye Seed, Inc. ("Dye Seed") alleges that Defendant Farmland Mutual Insurance Company ("Farmland") owed a duty to defend Dye Seed in two underlying lawsuits. The first lawsuit, *The Scotts Company, LLC v. Dye Seed Ranch, Inc., et. al.*, U. S. Dist. Court, E.D. Wash, Case No. CV-10-136-LRS ("the Federal complaint") was filed by Scotts Company,

1 LLC ("Scotts") on September 24, 2010. Scotts amended that complaint on  
2 November 12, 2010 ("the amended Federal complaint"). The second lawsuit,  
3 *Millhorn Farms, et. al v. Seeds, Inc., et.al.*, was filed in Whitman  
4 County Superior Court on October 6, 2010, ("the State court action").  
5 Scotts filed a cross-claim against Dye Seed in the State court action on  
6 April 28, 2011.

7 Each of these underlying suits stemmed from disputes regarding the  
8 purchase and sale of common Kentucky bluegrass seed (CKBG). Scotts was  
9 the purchaser of the seed. Dye Seed brokered the sales with numerous  
10 seed growers. Under this arrangement, Scotts agreed to purchase seed  
11 which conformed to specific quality standards and came from certain  
12 identified acreage. Scotts alleged that Dye Seed breached the agreement  
13 by mixing non-contract acres and lower quality seed with the seed that  
14 Scotts agreed to purchase.

15 During the time of the sales transactions, and while the underlying  
16 suits were pending, Dye Seed was insured under Commercial General  
17 Liability ("CGL") insurance policies issued by Farmland. These policies  
18 contained a Seed Merchants endorsement that expanded coverage to include  
19 coverage for damages stemming from the sale of wrong seed. After  
20 initially denying any coverage, Farmland agreed that the counter-claims  
21 filed by Scotts in the State court action alleged facts sufficient to  
22 trigger a duty to defend under the Seed Merchants endorsement. Thus,  
23 Farmland paid Dye Seed's defense costs in the State action commencing  
24 April 28, 2011.

25 Defendant Farmland asserts that neither the Federal action, nor the  
26 amended Federal action alleged facts sufficient to trigger a duty to

1 defend and has denied defense costs incurred in the Federal action. Dye  
2 Seed conceded that the original Federal suit did not trigger Farmland's  
3 duty to defend. However, Dye Seed asserts that the allegations Scotts  
4 raised in its amended Federal complaint obligated Farmland to provide a  
5 defense. The Farmland CGL policy (ECF No. 15-1) provides, in relevant  
6 part:

7 We will pay those sums that the insured becomes legally obligated  
8 to pay as damages because of... "property damage" to which this  
9 insurance applies. We will have the right and duty to defend the  
10 insured against any "suit" seeking those damages. However, we  
will have no duty to defend the insured against any "suit"  
seeking damages for... "property damage" to which this insurance  
does not apply.

11 The Seed Merchants Endorsement (ECF No. 15-1) amended and expanded  
12 the definition of "property damage" as follows:

13 Damages because of "property damage" include loss resulting from:  
14       a. The erroneous delivery of seed, which includes :  
15               (1) The failure to deliver seed;  
16               (2) The delivery of wrong seed; or  
17               (3) The delivery of seed at the wrong time or season;  
18       b. An error in mechanical mixture of seed; or  
19       c. The failure of seed to germinate...

20 **II. Plaintiff's Partial Summary Judgment (ECF No. 14)**

21 Dye Seed asserts that the allegations in the amended Federal  
22 complaint were sufficient to trigger Farmland's duty to defend, although  
23 the allegations in the amended Federal complaint were not as explicit as  
24 those in the State court action. Specifically, Scotts' amended Federal  
25 complaint alleged the following pertinent allegations:

26       1) Dye Seed Ranch agreed to procure and sell to Scotts certain  
common Kentucky bluegrass seed ("CKBG") and to provide services for the

1 benefit of Scotts concerning the quality control, processing packaging,  
2 marketing and sale of CKBG that is subject to the agreement. ¶12

3       2) Scotts agreed to pay Dye Ranch for the CKBG that is subject to  
4 the Scotts/Dye Agreement. The price to be paid and the CKBG to be  
5 purchased... depend upon at least the variety, quality, source and resale  
6 of the CKBG. ¶ 13

7       3) The Scotts/Dye Agreement requires that Dye Ranch...deliver seed  
8 meeting quality standards from the specified contracted acres after  
9 processing. ¶ 14

10      4) Scotts auditing authority includes the authority to audit Dye  
11 Ranch's books and records to determine and confirm the source, quality  
12 and identity of the seed... ¶ 16

13      5) To date, the audit has consisted of a limited review of a limited  
14 number of Grower Contracts, sales information and harvest data, including  
15 documentation of harvest receipts, seed processing, seed testing, and  
16 payment to growers. Although the audit is not complete, Scotts has  
17 already identified a number of practices that are inconsistent with, and  
18 in breach of, Dye's contractual obligations. ¶ 19

19      6) Dye Ranch's refusal to produce its books and records sufficient  
20 to enable Scotts to audit Dye Ranch's performance under the contract and  
21 the source, quality, identity and characteristics of the product that Dye  
22 Ranch has identified to the contract has damaged Scotts, and will  
23 continue to damage Scotts, until and unless the audit is completed. ¶ 25

24      7) Dye Ranch has failed to discount or reject CKBG that failed to  
25 meet the quality standards contained in the Scotts/Dye Agreement and/or  
26 Grower Contracts. ¶ 27

27      8) Dye Ranch...failed to reconcile the listed acres under the  
28 approved Grower Contracts with the acreage from which the actual seed was  
29 delivered or allocated to Scotts. ¶ 29

30      Dye Seed further asserts that the amended Federal complaint also  
31 sought damages for breach of the Scotts/Dye Agreement. Construing  
32 Scotts' amended Federal complaint liberally, as Farmland is obligated to  
33 do, Dye Seed argues it is apparent that Scotts was alleging that Dye Seed  
34 was selling seed that did not come from contracted acres and did not  
35 conform to the quality standard of the Scotts/Dye agreement - i.e., that  
36 Dye Seed sold the "wrong seed." Dye Seed argues that the above

1 allegations and in particular, paragraph 27 and 29 of the amended Federal  
2 complaint trigger Farmland's duty to defend.

3

4 Finally, at the time Farmland made its coverage determination,  
5 Farmland was aware that Scotts was alleging that Dye Seed had sold Scotts  
6 the wrong seed. Therefore, if there was any ambiguity regarding the  
7 claims being made in the amended Federal action, those ambiguities were  
8 clarified at the time that Farmland chose to deny coverage. Dye Seed  
9 concludes it is entitled to recover attorney fees and costs resulting  
10 from Farmland's improper coverage denial.

11 **III. Defendant's Motion For Partial Summary Judgment** (ECF No. 20)

12 Farmland's view is that no such duty to defend existed with respect  
13 to the amended Federal complaint because there is no clear allegation in  
14 that complaint that Scotts is seeking damages for the erroneous delivery  
15 of seed. The amended Federal complaint, Farmland argues, is clear and  
16 unambiguous. Farmland asserts that the claims stated therein, for breach  
17 of contract, declaration of rights and specific performance, are not  
18 claims for "damages" because of sale of the "wrong seed." Farmland  
19 argues that an allegation that seed may have failed to meet quality  
20 standards in no way suggests delivery of the "wrong seed." Farmland  
21 explains that products can fail quality standards for a variety of  
22 reasons having nothing to do with delivery of the wrong product.

23 Additionally, an allegation that Dye Seed failed to reconcile a list  
24 of approved growers' acreage with acreage from which seed was actually  
25 delivered is consistent with Scotts' continued request, in the Federal  
26 action, for specific performance from Dye Seed in the form of providing

1 books and records sufficient for Scotts to perform its audit. Scotts'  
 2 amended Federal complaint explicitly pled specific performance, which is  
 3 not a claim for damages, Farmland concludes.

4 Farmland states its "investigation" disclosed that neither Scotts  
 5 nor Dye Seed had interpreted the federal amended complaint to allege an  
 6 erroneous delivery of seed. Farmland argues it was not until April 2011  
 7 that Scotts' attorney developed the "newly minted theory" of delivery of  
 8 "wrong seed." Farmland bases this theory, in part, on a December 15,  
 9 2011 letter from Stephen Phillabaum to Farmland which read, in pertinent  
 10 part:

11 Days prior to the growers' suit, Scotts sued Dye and  
 12 Seeds in federal court alleging that Dye and Seeds had  
 13 not allowed audits. Dye and Seeds denied the  
 14 allegations, alleged the growers were necessary parties  
 15 whose joinder would destroy diversity, and obtained a  
 16 dismissal of the federal court action. Although that  
 17 dismissal is currently under appeal with the 9<sup>th</sup> Circuit  
 18 Court of Appeals, the federal case does not involve the  
 19 substantive issues involved in the Whitman County,  
 20 Washington case.

21 ECF No. 18 at 8.

22 Farmland further argues that although it exchanged letters with Dye  
 23 Seed's counsel after the December letter, Dye Seed did not dispute the  
 24 facts stated in the letter nor did it offer any other facts which might  
 25 tend to prove a claim within coverage of the Seed Merchants endorsement.  
 26 Farmland states Dye Seed's only argument was, and remains, that Farmland  
 cannot consider the above statements in the letter in making its coverage  
 determination.

27 Defense argues at best Scotts sought specific performance so it  
 28 could audit Dye Seed's books and records in order to determine whether  
 29 Dye Seed's practices were consistent with their agreement. Farmland

1 explains that there is a difference between stating a claim which seeks  
2 damages because of the delivery of "wrong seed" and seeking information  
3 which might, at some future point, suggest a basis for alleging a claim  
4 for damages because of delivery of the "wrong seed." Farmland concludes  
5 that the amended Federal complaint, read as a whole, does not state a  
6 claim potentially covered by the Seed Merchants endorsement of the  
7 Farmland insurance policy.

8 **IV. Discussion**

9 The duty to defend is a primary benefit of an insurance contract.  
10 *Safeco Ins. Co. of Am. v. Butler*, 118 Wash.2d 383, 392, 823 P.2d 499  
11 (1992)). Washington courts have long held that the duty to defend is  
12 different from and broader than the duty to indemnify. *Id.* (citing 1A  
13 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 5B.15, at 5B-143  
14 (1986)). Any ambiguity in the complaint against the insured is liberally  
15 construed in favor of triggering the insurer's duty to defend. *Truck  
16 Ins. Exch. v. Van Port Homes, Inc.*, 147 Wash.2d 751, 760, 58 P.3d 276  
17 (2002).

18 The insurer is entitled to investigate the facts and dispute the  
19 insured's interpretation of the law, but if there is any reasonable  
20 interpretation of the facts or the law that could result in coverage, the  
21 insurer must defend. Only if the alleged claim is clearly not covered  
22 by the policy is the insurer relieved of its duty to defend. *Kirk v. Mt.  
23 Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998). The insurer  
24 may not rely on facts extrinsic to the complaint to deny the duty to  
25 defend – it may do so only to trigger the duty. *Woo v. Fireman's Fund  
26 Ins. Co.*, 161 Wn.2d 43, 53-54, 164 P.3d 454 (2007).

1       The Court finds that Farmland's obligation to defend arises from  
2 the liberally construed allegations in the amended Federal complaint and  
3 the language in the insurance policy. Farmland's heavy reliance on the  
4 December 15, 2011 letter from Steve Phillabaum to Farmland is unavailing.  
5 This is so because the language "substantive issues" referred to in the  
6 letter is not sufficiently defined as to work an estoppel and cannot be  
7 construed as a waiver of coverage based on the allegations in the amended  
8 Federal complaint and the language in the insurance policy. Farmland's  
9 investigation of the insured's claim, which heavily leaned on the  
10 December 15, 2011 letter, was not sufficient in the context of the policy  
11 language to deny Defendant coverage.

12       Farmland's theory that Scotts only sought specific performance  
13 (audit Dye Seed's books and records) and if an audit showed that "wrong  
14 seed" was delivered, only then would a covered claim arise requiring  
15 defense representation, denies the obvious. The obvious being that if  
16 an audit does show a discrepancy and an erroneous delivery of seed,  
17 damages are specifically sought in the amended Federal complaint.  
18 Paragraph 33 of the amended Federal complaint reads:

19           As a proximate cause of Dye Ranch's breaches of the  
20 Agreement, Scotts is entitled to recover the following  
**damages**, declaratory, and equitable relief:

21           ...

22           (C) An award of **damages** from Dye Ranch in an amount to  
23 be determined at trial. [Emphasis added.]

24       The Court agrees with Plaintiff that Scotts' claim for "damages" is  
25 sufficient to trigger Farmland's duty to defend. Under the Seed  
26 Merchants Endorsement, "erroneous delivery of seed" could include no  
delivery of seed at all, delivery of "wrong seed," or delivery of right  
seed "at the wrong time or season." An insurer's duty to defend arises

1 when any part of the claim is potentially or arguably within the scope  
 2 of the policy's coverage, even if the allegations of the suit are false,  
 3 fraudulent, or groundless." 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON  
 4 INSURANCE § 200:12 at 200-35 to 200-36 (3d ed.2005). Any ambiguity in  
 5 the complaint against the insured is liberally construed in favor of  
 6 triggering the insurer's duty to defend. *Truck* at 760. Even if an audit  
 7 revealed that the seeds delivered were correct, the duty to defend arises  
 8 when any part of the claim is potentially within the scope of the  
 9 policy's coverage.

10 Finally, it matters not that Scotts' counsel did not begin pursuing  
 11 the theory of erroneous delivery of "wrong seed" until April, 2011, based  
 12 on the fact that Scotts did allege a breach of the agreement in the  
 13 amended Federal Complaint on November 12, 2010. The theory of erroneous  
 14 delivery of "wrong seed" was inherent in the language used in the amended  
 15 Federal Complaint. Any reasonable interpretation of the language,  
 16 particularly in paragraphs 27 and 29, when joined with the request for  
 17 damages in paragraph 33 of the amended Federal complaint, would indicate  
 18 that Scotts was looking for compensation if the "wrong seed" was  
 19 delivered.

20 **V. Attorney Fees**

21 An insured that is compelled to assume the burden of legal action  
 22 to obtain the benefit of its insurance contract is entitled to recover  
 23 an award of attorney fees to compensate it for the legal expenses  
 24 incurred in vindicating the right to the claimed benefit. *Olympic S.S.*  
 25 *Co. v. Centennial Ins. Co.*, 117 Wash.2d 37, 52-3, 811 P.2d 673 (1991).  
 26 Because Dye Seed was required to initiate this action in order to obtain

1 the benefits to which it was entitled, it is entitled to an award of  
2 attorney fees in this court.

3 Accordingly,

4 **IT IS ORDERED** that:

5 1. Plaintiff's Motion for Partial Summary Judgment, **ECF No. 14**, is  
6 **GRANTED**. Defendant Farmland has a duty to reimburse Plaintiff Dye Seed,  
7 Inc. for its defense costs incurred in the defense of the amended Federal  
8 complaint filed by Scotts against Dye Seed in federal court on November  
9 12, 2010 (CV-10-326-LRS). Plaintiff shall file with this Court, within  
10 ten (10) days of this Order, a declaration itemizing and setting forth  
11 its fees and expenses which have been incurred. Counsel for the  
12 Defendant shall file any objection(s) thereto within ten (10) days  
13 following filing of Plaintiff's declaration. Plaintiff shall have five  
14 (5) days thereafter to respond to any objections after which the matter  
15 will be deemed under advisement without oral argument.

16 2. Defendant'S Motion for Partial Summary Judgment, **ECF No. 20**, is  
17 **DENIED**.

18 **IT IS SO ORDERED**.

19 The District Court Executive is directed to enter this Order and  
20 judgment consistent with this Order.

21 **DATED** this 19th day of June, 2013.

22 *s/Lonny R. Sukko*

23 \_\_\_\_\_  
24 LONNY R. SUKKO  
UNITED STATES DISTRICT JUDGE  
25  
26